United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

74-1565

JUL 19 1974

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UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

NO. 74-1565-A

UNITED STATES OF AMERICA,

Respondent-Appellee:

vs

FRANCISCO SOLIMENE,

Petitioner-Appellant:

PETITIONER-APPELLANT'S BRIEF IN CHIEF *APPENDIX

Francisco Solimene
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United States Penitentiary
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On Brief Impropria Persona

PAGINATION AS IN ORIGINAL COPY

ISSUES PRESENTED FOR REVIEW

Issues presented for review are:

1. Whether the judge, in his "Memorandum of Decision and Order" of March 11th, 1974 (A-1) erred in denying the relief sought in the defendant's Rule 35 Motion to reduce sentence (A-2).

2. Whether the judge properly forwarded the record to the Court of Appeals when the defendant sought review on a subsequent Rule 35 application (A-3).

3. Whehter the application for review controverting the language of the Court (relying on the comments of the presentence report) erred in not ordering an evidentiary hearing when considerable doubt is presented.

4. Whether the defendant was denied his Constitutional Right to be confronted with his accusor to rebut the accusations made.

5. Whether the sentence in this case is valid based on misinformation presented to the Court in the presentence report to enhance punishment.

STATEMENT OF THE CASE

This is an appeal in connection with a motion pursuant to Rule 35 Federal Rules of Criminal Procedure. The petitioner is a Federal prisoner, and he sought relief from the sentence imposed in Criminal Number 71-CR-1281, in the Eastern District of New York (A-4), to wit, 15 years imprisonment followed by a 15 year special parole term as per 21 USC 841 (A) (1).

The petitioner was charged and convicted by jury of conspiracy to import narcotics and sentenced on May 22nd, 1972 by the late Judge Rosling. He sought appeal to the United States Court of Appeals for the Second Circuit and was affirmed without opinion on March 7th, 1973. Subsequently he applied for a Petition for a Writ of Certiorari and was denied October 9th, 1973. The petitioner thereafter made a proper application pursuant to Rule 35 Federal Rules of Criminal Procedure for reduction of sentence (A-2).

The motion was denied (A-1) with written opinion and petitioner reapplied for review (A-3) based on some misinformation and non-factual comments alleged a pertinent part of the presentence report. The review was submitted with the entire record to this Court and deemed and docketed

as an appeal.

Your petitioner is therefore before this Court properly seeking to have the sentence set aside and an order to remand for resentencing after proper and factual presentence investigation is made. The foregoing facts are shown in the record on appeal, submitted by the District Court, and in the appendix attached hereto.

The petitioner has presented the following claims to the Court:

a) The Court erred in denying the relief sought because the denial was based on misinformation and purported non-factual comments made pertinent part of the presentence report;

b) The Court erred in not ordering an evidentiary hearing when the defendant presented considerable doubt in the comments of the Courts memorandum extracted from the presentence report;

c) The petitioner was denied his Constitutional Right to be confronted by the Agent who made a statement to the Probation Department relating the underworld activities without the benifit of rebuttal;

d) The sentence as it now stands is illegal as imposition was based upon misinformation used to enhance the sentence imposed.

On January 29th, 1974, Francisco Solimene (hereinafter referred to as defendant or petitioner) submitted a motion entitled "Motion Pursuant to Rule 35 Federal Rules of Criminal Procedure" (A-2). The essence of his motion is based upon application for the reduction of sentence imposed prior to appeals sought.

On March 11th, 1974, Jacob Mishler, judge, sitting in for the late sentencing judge, denied the application in an order with written memorandum (A-1). Upon receipt of said order, the defendant sought review in an additional Rule 35 application (A-3), setting out pertinent information with exhibits relating to the misinformation relied upon in the memorandum. When the court received this application for review, it should have then ordered an evidentiary hearing to determine the controversal points raised therein. Instead, the court chose to open the matter and sought adjudication from the Court of Appeals.

The test now is to determine did the lower court act properly by not ordering an evidentiary hearing on the points raised controverting the courts order displaying the misinformation relied strongly upon and quoted from the presentence report? We think not, because, misinformation and misunderstanding that is materially untrue regarding a prior criminal record or material false assumptions as to

any facts relevant to sentencing, rende[illegible] the entire sentencing procedure invalid as a viol[illegible]on of due process. Townsend v. Burke, 334 U. S. 740 (1948).

Appellate Courts however, do have the powers to review a denial of collateral relief (regardless of the caption or manner which presented) on a claim that a sentence is the product of procedures inconsistent with due process of law. Townsend v. Burke, supra. See also Appellate Review of Sentencing Procedures 74 Yale L.J. 379 (1964). See United States v. Malcolm, 432 F. 2d 809 (2d Cir., 1970).

The petitioner was sentenced to a sum total of 30 years even though 15 of said years are construed as a special parole term following confinement. In essence, the term in years, regardless of where it is to be served, either confinement or supervisory, it is in a form of custody. There exists no possible reason for such severe punishment other than the district courts reliance on uncorroboarated hearsay contained within the presentence report. This is the rankest sort of hearsay which deserves to fester in the open. If the defendant is to be sentenced for inferred misdeeds (conveyed in the presentence report submitted for the court to use to determine the length of sentence), character association, branded as an underworld figure with "...(S)uch large scale that he must certainly

have extensive financial backing and underworld connections...", the government, to say the least, has the burden of proving this incriminating and damaging hearsay evidence for the purpose of having meted out such a severe penalty.

The defendant should not have been sentenced with this form of hearsay contained in the presentence report. There is no room for assumption by a court to lawfully sentence a defendant on hearsay contained in the presentence report. United States v. Espinoza, 481 F. 2d 553 (5th Cir., 1973); United States v. Battaglia, 478 F. 2d 854 (5th Cir., 1972).

In United States v. Malcolm, 432 F. 2d 809 (2nd Cir., 1970) the Second Circuit remanded for resentencing and stated:

> "The result of the procedural irregularity is that the sentence rests on a foundation of confusion, misinformation and ignorance of facts vitally material to mitigation. If justice is to be done, a sentencing judge should know all the material facts. The information which was curtailed and precluded here should therefore have been received and considered. Fair administration of justice demands that the sentencing judge will not act on surmise, misinformation and suspicion but will impose sentence with insight and understanding. Harris v. United States, 382 U.S. 162, 166, 86 S. Ct. 352 L. Ed. 2d 240 (1965)."

> "(T)he judge, therefore, is required to listen and to give serious consideration to any information material to mitigation of punishment. We cannot say that if the judge had acted on the basis of complete and accurate information, verified by the prosecutor, it would have had no mitigating impact on the sentence. This is so although the judge, in his discretion, is not required to lighten the penalty even if there are mitigating circumstances." 432 F. 2d at 819.

If factual background is erroneous, defendant should have the opportunity to inform the court concerning the alleged misinformation. See: United States v. Carden, 428 F. 2d 1116 (8th Cir., 1970).

In Townsend v. Burke, supra, the Supreme Court made it clear that a sentence cannot be predicated on false information (such as here). They further went on to say; "...(A) rational penal system must have some concern for the probable accuracy of the informational inputs in the sentencing process."

It is crystal clear, as made manifest by the opinion of the court and the presentence report, that this is what occured. The court relied on surmise and misinformation. This illegal procedure places an almost intolerable burden on a defendant. How can the defendant rebut unfounded hearsay, unproven charges.

Quoting verbatim fro.the presentence report, specifically the "summary", we find:

> "However, it is noted that agent's seized approximately $87,000.00 in large denominations of bills from a safe deposit box rented by the defendant".
> (Emphasis Added)

> "Agent's advise that the defendant is on such large scale that he must certainly have extensive financial backing and underworld connections".
> (Emphasis Added)

Both statements are not only erroneous and misinformation, but they must have certainly been used to enhance the punishment to the extent that the defendant received the greatest of all terms imposed in the case.

The safe deposit box was not rented nor maintained by the defendant. This in itself manifest misinformation. The comments on the defendants financial background, backing and underworld connections is rank hearsay without the defendant being afforded his Constitutional Right to rebut them. See: Article VI of the Amendments to the Constitution.

Before the bar to be sentenced stood an immigrant recently sworn citizen, limited in english to the extent of being considered semi-literate and denied the right to be confronted with his accusor. Surely it appears Constitutional violation of a severe magnitude transpired when hearsay can be used to destroy a defendant.

Here stood a man, still proclaiming innocence, downhearted and depressed, confused and shocked with the only hope that mercy would be in the mind of the sentencing judge, and then be destroyed and put away for a sum total of thirty (30) years on unproven and unrebutted comments never before mentioned and presented for the sole purpose of enhancing the punishment to be assessed.

Where was the evidence to substantiate the claims? Why had not the accusor come forward to boldly make these acqusations? A picture appears why they remained in the shadows making these comments. It was because the defendant was so limited in understanding that such comments may easily slip by undetected until now. The test now is can they remain in tact causing the addtional hardships?

In United States v. Weston, 448 F. 2d 626 (9th Cir., 1971) the sentence was challenged where it was clear that the judge had relied on potentially unreliable hearsay in assessing the maximum penalty as in the instant case. Where a sentencing judge explicity relies on certain information in assessing a sentence, fundamental fairness requires that a defendant be given at least some opportunity to rebut that information. United States v. Espinoza, supra, and see United States v. Tucker, 404 U.S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592.

In United States v. Janiec, 464 F. 2d 126 (3rd Cir., 1972) the Third Circuit confronted the issue of a defendant's rights at sentencing. The Court held that:

> "(I)f there is, one, "misinformation of a constitutional magnitude" before the district court, and, two, if that "misinformation" is given specific consideration (1) by the sentencing judge, then the case must be remanded for sentencing anew". Id, at 129

In the "Memorandum of Decision and Order" the judge specifically states the presentence report indicates the defendant is a major participant in the conspiracy. This comment is a distorted picture for analyzation based on the following:

> "...next came poor Mr. Solimene,..." (line 24 at page 1182)

> "On these criteria, Solimene is clearly not the top dog of this receiver group. He is the one assigned.....He is the one that takes the trip to Buenos Aires, risks exposure, risks entries being made into his passport.....He is the one person who people are always calling on the telephone, saying, 'Come quickly, Fatty, we have something for you to do.'.....He's not the top dog. You can tell by the way people treat him, the way he acts, and the things he does." (line 24 at page 1183 thru line 13 at 1184).

> "He sends Solimene.....he sends Solimene." (line 19 at page 1184).

Footnote 1. The $87.000.00 seized in the safe deposit mentioned in the presentence report, and the safe deposit box, were never rented nor maintained by the defendant.

"....instructs Solimene that he is supposed to go to Buenos Aires." (line 7 at page 1185).

Mr. Bashain, the Assistant United States Attorney, continued in this vein of colloguy for page on end to convince the jury Solimene was such a minute figure regardless of his presence at trila. The discourse was primarily expressed to convict the co-defendant, yet was constructed from the actual testimony. These statements totally related to the trial are in diametric opposition to the comments embellished and incorporated in the presentence report.

CONCLUSION

We submit that the Petitioner-Appellant should have his sentence set aside and an order issued to remand for resentencing. Prior to the reimposition of a valid sentence, there should be ordered a new, factual and non-prejudical presentence report made. There can be no question that the sentencing of this defendant was enhanced based upon the misinformation made a pertinent portion of the record.

Had this misinformation and distortion been made known to the sentencing judge, a different term would have been imposed. It is crystal clear that the late sentencing judge relied strongly on the faulty presentence

report prior to meting out punishment.

Respectfully submitted,

Francisco Solimene

Francisco Solimene

On Brief Impropria Persona
(With assistance.)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

NO. 74-1561-A

UNITED STATES OF AMERICA,

Respondent-Appellee:

vs

FRANCISCO SOLIMENE,

Petitioner-Appellant:

APPENDIX

(A-1)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - -

71 CR 1281

UNITED STATES OF AMERICA

-against-

Memorandum of Decision and Order

FRANCISCO SOLIMENE,

Defendant.

March 11, 1972

- - - - - - - - - - - - - - - - - -

Defendant moves to reduce the sentence imposed on May 20, 1972 by Judge George Rosling.[1] Defendant was convicted after trial before a jury on a charge of conspiracy to import 155 pounds of heroin (95% pure) from Panama. Defendant was sentenced to a maximum term of 15 years, plus a special parole term of 15 years.

The defendant describes himself as a "minor figure" in the conspiracy. The presentence report relating the details of the conspiracy indicates that defendant was a major participant in the conspiracy. On May 28, 1971, at

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[1] Judge Rosling died in April, 1973. This case was assigned to the writer under a rotation procedure adopted by the court for the distribution of matters pending before Judge Rosling.

the St. Moritz Hotel, defendant agreed with one Felice Bonnetti and others to finance the cost of large shipments of heroin imported from South America. Defendant traveled to South America and met with one San Martin, also known as Benito Brondarbit, and arranged for the importation of the heroin. The heroin was seized on July 8, 1971, when the suitcases of one Rafael Richard, Jr., son of the Panamanian Ambassador to China, was searched. The Government seized a safe deposit box maintained by the defendant containing $87,000 in cash.

There is no reason advanced for disturbing the sentence imposed.

Motion to reduce the sentence imposed is denied and it is

SO ORDERED.

The Clerk of the Court is directed to forward a copy of this memorandum of decision and order to the defendant.

U. S. D. J.

The United States District Court

For the

(A-2)

Eastern District of New York

United States Of America)
Vs.)
Francisco Solimene, et al,) Case No. 71-Cr. 1281
Defendant)

Motion Pursuant to rule 35 of the
Federal rules of Criminal Procedure

Comes now Francisco Solimene, the defendant in the above entitled cause, who respectfully Petition this Honorable Court to reconsider the harsh sentence of 15 years ~~15 years~~ special parole imposed on May 20th, 1972, in the above entitled cause; the petitioner having exhausted his right of appeal, respectfully make's this application for a reduction of sentence within the 120 days provided therefor, in rule 35, F.R.C.P., for the followin reasons among others:

The petitioner will not burden this Honorable Court with a long recitation of petitioner's past history; for the facts relevant thereto, are contained in petitioner's pre-sentence report; nor does petitioner have a long list of accomplishments to parade before the court. But, I would call to the court attention that; I am 40 years old, I have a wife and a daughter 12 years old. I would also call to the court's attention; that this is my first and only felony conviction.

Petitioner does not have a list of legal reasons to cite to this court, as justification for a reduction of sentence; since the sentence no matter how severe was within the discretion of the trial court. But petitioner respectfully believe, that the 120 day provision of rule 35, F.R. C.P., was created, so that a trial judge could temper justice with mercy, outside of the atmosphere of impassioned pleas of prosecutors and trial attorneys. In the instant case the prosecutor made it abundantly clear; that the petitioner was not a major figure in the alleged criminal venture; as the prosecutor said:

"There were layers and layers of people between him. The very first layor was the layer of Guillermo Gonzales and Raphael Richard, above that was the layer of Larmartin, next came poor Mr. Solimene," (see trial transcript P. 1182-83-84-85)

The petitioner although only a minor figure received the longest sentence, which was a sentence of 15 years in the custody of the United States Attorney, and 15 years special parole thereafter. Petitioner is not attempting to raise a question of disparity of sentence, since the sentence no matter how harsh, was within the court's discretion; what the petitioner is requesting is, that this Honorable Court acting within it authority as provided by rule 35; review and re-consider the sentence imposed on this petitioner, and that the sentence be reduced to one lesser in nature.

Wherefore, the petitioner respectfully pray this Honorable Court to reduce the sentence heretofore imposed, in the above entitled cause, and for all other relief right and proper in this premise.

Respectfully submitted;

Francisco Solimene

Francisco Solimene, Petitioner, Pro se
Reg. No. 75818-158, Qtrs. A-313
Post Office Box 1000
Leavenworth, Kansas 66048

MAR. 20, 1974
(A-3)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, :
:
VS : CASE NO. 71 6R 1281
:
FRANCISCO SOLIMEME, ET AL, :
:

MOTION FOR REVIEW PURSUANT TO RULE 35 OF FEDERAL RULES OF CRIMINAL PROCEDURE: FOR THE DENIAL ORDER OF MARCH 11th, 1974.

COMES NOW, Francisco Solimene, defendant herein, by pro se application, and moves the Court to review it's Order of March 11th, 1974; denying relief of his initial petition for reduction of the sentence imposed on May 20th, 1972; and in support thereof, states as follows:

The initial term of custody imposed in this cause was a maximum term of 15 years, plus a special parole term of 15 years. All being considered, the custody of the defendant, be it physical or supervision, is a sum total of 30 years.

The Court, in denying the initial Rule 35 motion of January 29th, 1974 refers in pertinent part to the presentence report that has indicated the defendant as being a major participant in the conspiracy that eventually brought about this conviction. Additionally, defendant is viewed as being the "King Pin", so to speak, while in

essence the opposite is what the Government described him in it's summation of the trial that brought about the conviction.

A purusal of the appendix attached hereto, it is submitted that, the emphasized lines (underlined) bring forth fruit substantiating the misrepresentation of the defendant as being the "King Pin". There must be some error along the way, because when the Government relys so strongly and specifically to evidence to bring out in summation to obtain a conviction, they must surely be right and call the matter as they see it without tainting the evidence.

The Court imposed a 30 year sentence on the defendant and he alleges that the sentence imposed is not consonant with sentences imposed by this Court in other such cases, and that, he has somehow been singled out and subjected to a sentence which is excessive and entirely out of keeping with sentences imposed generally by this Court in comparable cases.

Defendant, in addition, asks this Court to reconsider the sentence imposed upon him in a realistic light with a view toward what the United States Board of Parole will actually do and not toward what it will be capable of doing with a view toward sentences imposed in comparable cases in this Court. This is a narcotic conviction and the Board of Barole tends to view these offenses in a different light.

Review of the pertinent facts relative hereto, defendant is 41 years old; married with a 12 year old daughter; he has never been convicted of a felony or any such crime. This exemplary [redacted]

record, plus his conduct and work record since being confined, and the readjustment in these past 2 odd yeams, should have substantial consideration favorable to him. It will manifest that punishment has been achieved and the process of rehabilitation has commenced. The defendant has not only brought shame and hardships upon himself, but to his family as weal, who seem to suffer along with him. Surely a 30 year sentence in this day and age can only be viewed as punitive rather than a rehabilitation term. All considered, with the record speaking for the defendant, this exemplary record could warrant the tempering of justice with mercy.

Justice will surely be served regardless of the term, but, to consider further, stating again, would not the family of the defendant, suffer the difficulties and hardships. The defendant once again asks the Court to look upon this motion with compassion and mercy.

WHEREFORE, Defendant, Francisco Solimene, moves the Court to reduce the sentence of 15 years imprisonment and 15 years special parole, to some other and lesser sentence which shall be proper and just in the premise. It is ever prayed this Court will so decide and adjudicate.

Respectfully submitted,

Francisco Solimene
Reg. No. 75818-158
U.S. Penitentiary
P.O. Box 1000
Leavenworth, Kansas 66048

I hereby certify that I have placed a true copy of the foregoing in the mails postage prepaid to the United States Attorney; U.S. District Court; New York this_____day of March, 1974.
